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IN THE

Supreme Court of the United States

DAVID A. ZUBIK, ET AL., *Petitioners*,

v.

SYLVIA BURWELL, ET AL., *Respondents*

[Additional Captions Listed on Inside of Cover]

On Writs of Certiorari to the United States Court of Appeals for the Third, Fifth, Tenth, and D.C. Circuits

Brief of The Catholic Benefits Association and The Catholic Insurance Company, as *amici curiae* in support of Petitioners

L. MARTIN NUSSBAUM
Counsel of Record
ERIC N. KNIFFIN
IAN S. SPEIR
Lewis Roca Rothgerber Christie LLP
90 S. Cascade Ave.
Suite 1100
Colorado Springs, CO 80903
mnussbaum@lrrc.com
(719) 386-3000
Counsel for *Amici Curiae*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, ET AL., *Petitioners*,

v.

SYLVIA BURWELL, ET AL., *Respondents*

EAST TEXAS BAPTIST UNIVERSITY, ET AL., *Petitioners*,

v.

SYLVIA BURWELL, ET AL., *Respondents*

SOUTHERN NAZARENE UNIVERSITY, ET AL., *Petitioners*,

v.

SYLVIA BURWELL, ET AL., *Respondents*

PRIESTS FOR LIFE, ET AL., *Petitioners*,

v.

SYLVIA BURWELL, ET AL., *Respondents*

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, ET AL., *Petitioners*,

v.

SYLVIA BURWELL, ET AL., *Respondents*

QUESTIONS PRESENTED

Did the Courts of Appeals err when they accepted the government's representation that, under the accommodation, the Departments of HHS, Labor, and Treasury have the regulatory authority to create "new contracts" with third party administrators that require them to provide CASC services "independent" of their contracts with objecting non-exempt ministries?

Did the Courts of Appeals err when they accepted the government's representation that Congress delegated to the Department of Labor the authority to unilaterally turn a third party administrator into a "plan administrator" with the fiduciary duty to deliver CASC benefits?

If the answer to either of these questions is no, is the accommodation truly an "opt out" or an "exemption process," as the government has represented and the Courts of Appeals have accepted?

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INTERESTS OF AMICI CURIAE[1]

Amici are **The Catholic Benefits Association** ("CBA") and its wholly-owned subsidiary, **The Catholic Insurance Company** ("CIC"). The CBA is an Oklahoma non-profit limited cooperative association committed to assisting its Catholic employer members in providing health coverage to their employees consistent with Catholic values. The CBA provides such assistance through its website, training webinars, legal and practical advice for member employers, and litigation services protecting members' legal and conscience rights. One example of such services is the CBA's white paper, "The Mechanics and Effects of the Accommodation," published on its website.[2] The CBA's member-employers include over 700 Catholic dioceses, schools, colleges, social services agencies, hospitals, senior housing, and closely held for profit employers. One of the conditions of membership is that the member affirm that its health care coverage complies with Catholic values.

The CIC provides stop-loss insurance and arranges for provider networks and third party administration for CBA members with self-funded plans.

Because of the CBA's and the CIC's daily interactions with health care insurers, benefits

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[1] The parties' counsel were timely notified of and consented to the filing of this brief. Neither a party nor its counsel authored this brief in whole or in part. No person or entity other than *amici curiae* or their counsel made a monetary contribution to the preparation and submission of this brief.

[2] http://www.catholicbenefitsassociation.com/cbn/en/resources/effects-of-accommodations-exhibits.pdf.

consultants, third party administrators, and many types of Catholic employers, they have developed substantial familiarity with the Affordable Care Act; its mandate that employer plans must include coverage for contraceptives, abortion-inducing drugs and devices, sterilization, and related counseling ("CASC Mandate"); the religious employer exemption; the so-called accommodation; the ruinous fines for violation of the Mandate; and ERISA and other federal laws.

The CBA's bylaws require it to have "an Ethics Committee comprised of the Catholic bishops serving on [its] board plus any additional number of Catholic bishops as appointed by the committee." This committee has exclusive authority to determine that the CBA's and the CIC's benefits, products, and services conform to Catholic values and doctrine. The committee's members, from inception to today, are the Catholic archbishops of Baltimore, Oklahoma City, Philadelphia, and Seattle.

On September 12, 2014, shortly after the government adopted its "augmented accommodation," the CBA Ethics Committee unanimously approved this resolution:

> That the use of contraceptives, abortion-inducing drugs and devices, sterilization, and counseling in support of such options ("CASC services") is contrary to Catholic values. A Catholic employer, therefore, cannot, consistent with Catholic values, comply with the government's CASC mandate, with the accommodation provided to "eligible employers," or with the "augmented accommodation"—unless such an employer

has exhausted all alternatives that do not effect a greater evil and unless such an employer has taken reasonable steps to avoid giving scandal.

SUMMARY OF ARGUMENT

One hundred forty plaintiffs, representing well more than a thousand religious ministries, have filed fifty-six cases pleading with the federal courts to relieve them of the substantial burden that the government's CASC Mandate places on their religious exercise. Never in American history have so many religious entities filed suit to protect their rights of conscience. Yet, according to the government and the circuits that have sided with it, these ministries are battling a phantom: the religious burden about which they complain and for which they have risked ruinous fines simply does not exist.

The Courts of Appeals ruled as they did because they uncritically accepted two inaccurate representations the government made about its power to make the accommodation work. These representations were erroneous from the outset—which is why the government quietly abandoned them upon these cases' final approach into this Court. In its briefing here, the government now cedes the very ground on which it invited the lower courts to rest their holdings.

First, the government told lower courts that it had the power to force a third party administrator ("TPA") of a self-insured ministry to deliver CASC services *outside of* and *independent of* the ministry's group health plan. In its briefs to five different circuits, the government insisted that under the accommodation, religious ministries "need not place

contraceptive coverage into the basket of goods and services that constitute their healthcare plans." E.g., Gov't Br. at 25, *Priests for Life* v. *U.S. Dep't of Health & Human Servs.*, Nos. 13-5368, 13-5371, 14-5021, 772 F.3d 229 (D.C. Cir. 2014) (quotation omitted).[3] The Courts of Appeals bought this argument, concluding that ministry plaintiffs were mistaken to think the accommodation "hijacks" their health plans and uses them as conduits to deliver CASC services.

Second, the government urged that it had authority under ERISA to unilaterally turn a TPA (that provides only administrative services) into a "plan administrator" with the fiduciary duty to deliver CASC benefits to plan participants. The Courts of Appeals were again persuaded, concluding that ministry plaintiffs were mistaken to think the accommodation forces them to bestow this responsibility on TPAs and thereby "trigger" their employees' access to CASC services.

These representations were critical to government's victories. They were also rhetorically convenient, allowing the government to paint the accommodation as an "opt out," even an "exemption process," Gov't Br. at 33, *E. Tex. Baptist Univ.* v. *Burwell*, Nos. 14-10241, 14-10661, 14-20112, 14-40212, 793 F.3d 449 (5th Cir. 2015),[4] and to fervently attack ministries' religious objections as an "extraordinarily broad" effort to block third parties from receiving the "federal protections or benefits to which they are entitled," Gov't Br. at 32, 28 n.7,

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[3] Available at http://www.becketfund.org/wp-content/uploads/2016/01/Priests-for-Life-D.C.-Cir.-Governments-Brief.pdf.

[4] Available at http://www.becketfund.org/wp-content/uploads/2014/09/9.16.2014-5th-Circuit-Govt-Brief.pdf.

Little Sisters of the Poor v. *Burwell*, No. 13-1540, 794 F.3d 1151 (10th Cir. 2015).[5]

The trouble is, the government was wrong. And it was this Court's impending scrutiny that flushed out the errors.

In its briefing to this Court, the government has now made crucial concessions that not only contradict its representations to the Courts of Appeals but also fatally undermine those courts' decisions. First, the government has surrendered the pretense that the accommodation creates obligations for a TPA independent of the plan. It now concedes that CASC coverage provided by a TPA "is, as an ERISA matter, *part of the same ERISA plan as the coverage provided by the employer*." Gov't Br. in Opp. at 19, *E. Tex. Baptist Univ.* v. *Burwell*, No. 15-35 (emphasis added). Second, the government now retreats from its argument that the TPA has an obligation to provide CASC services *before* the self-insured ministry invokes the accommodation, admitting that the TPA becomes "legally responsible for complying with the contraceptive-coverage requirement *only after* the organization itself opts out." Gov't Br. in Opp. at 21 n.11, *Priests for Life* v. *Dep't of Health & Human Servs.*, Nos. 14-1453, 14-1505 (emphasis added).

The government makes these concessions because it must. Its earlier representations to the lower courts were error. The government should now take the further step and end its profoundly misleading portrayal of the accommodation as an "opt out" or

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[5] Available at http://www.becketfund.org/wp-content/uploads/2014/10/LSP_DOJ-Merits-Opp.pdf.

"exemption." As federal law makes clear, if a self-insured ministry's TPA is legally bound to deliver CASC services to plan participants, it is only because the ministry remains inextricably tied to the delivery of those services to the ministry's employees through ministry's plan.

The reason lies in both the Affordable Care Act ("ACA") and ERISA. The ACA imposes its mandate on an employer's "group health plan." Under federal law, employee benefits plans, including group health plans, belong to the employer. It is the employer's plan, established and maintained for the benefit of the employer's employees. ERISA sets forth what a plan is, how it is established, and how it is operated. Critically, ERISA makes clear that it is only the employer who can establish a plan, define its basic terms, and subsequently amend it. Church plans that are exempt from ERISA operate no differently.

The ACA's statutory mandate, coupled with HRSA's guidelines, requires each petitioner's "group health plan" to cover CASC services. The government persistently argued in the courts below that the accommodation removes this obligation from an objecting ministry and places it on a third party, the ministry's TPA. That is not so. The accommodation does not operate that way, and it cannot operate that way. Under the ACA, the only way employees have access to CASC benefits is through their employer's plan. Although the accommodation may shift to a third party the duty to pay for these benefits, the fundamental obligation to provide the benefits remains on the employer, and more precisely, on the employer's plan. Employees have access to CASC benefits only because they are

participants in the plan, and they cease to have access when they cease to be participants (such as when employment ends). Furthermore, TPAs become obligated to pay for CASC benefits under the accommodation only because they have preexisting contractual or fiduciary obligations to the plan.

The plan, then, is central to the ACA's mandate scheme. The employer establishes a group health plan, the ACA and the government's regulations require the plan to cover CASC services, and the accommodation does nothing to alter that requirement. Even if an employer invokes the accommodation, employees will receive CASC benefits because they participate in the plan, and third parties must pay for those benefits because of their relationship to the plan.

Herein lies the root of the religious objection. Catholic and evangelical Protestant employers oppose the statutory mandate and the regulatory accommodation on grounds of moral complicity. In their view, the government has co-opted their plans—something they established and maintain for the good of employees—into vehicles for the delivery of items they find morally evil.

The accommodation, far from relieving employers of this complicity, actually worsens it by requiring an employer to *affirmatively act* to effect the delivery of CASC services. The original accommodation requires an employer to execute EBSA Form 700. Buried in the final sentence of the form are these words: "This form is an instrument under which the plan is operated." After the August 2014 "augmentation" of the accommodation, employers are now told that either "[t]his form or a notice to the

Secretary [of HHS] is an instrument under which the plan is operated." See *infra*, Appendices at 3a, 7a.

The concept of a "plan instrument" originates in ERISA. ERISA requires all plans to be "established and maintained pursuant to a written instrument." 29 U.S.C. § 1102(a)(1). That instrument must specify the formal procedures for amending the plan and the person with authority to make these amendments.

Under ERISA, only the employer or its designee can execute the plan instruments necessary to establish or amend a plan. The government cannot do this for an employer. So for the accommodation to comply with current federal law, the government had to find some way to make the employer amend its own plan to cover CASC services. **That is the hidden purpose and actual legal effect of the notice requirement.** By requiring an objecting ministry to provide Form 700 to its TPA or a notice to HHS, the government compels the ministry to execute an ERISA plan instrument and affirmatively amend its own health plan to include CASC coverage. This is not an *opt-out* process. It is a *forced-in* process. The legal complexities allow the government to maintain the regulatory masquerade.

Not only was the government never forthright with the Courts of Appeals about how the law works, those courts simply ignored the law. Take, for example, Judge Posner, author of three appellate decisions on the accommodation. In *Wheaton College* v. *Burwell*, 791 F.3d 792, 800 (7th Cir. 2015), he invented a new concept and christened it a "governmental plan instrument," suggesting that when an employer invokes the accommodation,

"[w]hat had been [the employer's] plan, so far as emergency contraception was concerned, the Affordable Care Act ma[kes] the government's plan." Even the government has not gone that far. Nothing in the ACA or ERISA authorizes the government to do what Judge Posner has suggested. Creative it is. The law it is not.

Because the CASC Mandate operates on the employer's plan, religious ministries are inextricably linked to the delivery of CASC services to their employees, even under the accommodation. And because their faith teaches that their health plans cannot be made the vehicles for delivering such services, the Mandate imposes a substantial burden on their religious exercise. The Courts of Appeals fundamentally erred by misunderstanding this; by ignoring the ACA's plan-centric mandate scheme; and by finding that "the line [the ministries] drew was an unreasonable one." See *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778 (2014) (quoting *Thomas* v. *Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 715 (1981)) (internal quotation marks omitted).

ARGUMENT

The courts below accepted the government's misleading account of how the accommodation works with respect to self-insured ministry employers.[6]

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[6] *Amici*'s analysis here focuses exclusively on the burden the CASC Mandate imposes on employers like East Texas Baptist University with self-funded plans. To the extent that the Mandate also falls on "health insurance issuer[s]," it burdens the religious exercise of employers who buy group insurance by depriving these employers of any option that excludes CASC services. See, e.g., *Pierce* v. *Soc'y of Sisters*, 268 U.S. 510 (1925)

First, the government insisted that it could require TPAs to provide CASC coverage independent of the group health plans created and sponsored by objecting ministries. Second, the government claimed that, without involving the employer, it could turn an ordinary TPA into a "plan administrator" with fiduciary responsibility to deliver CASC services. Both assertions are wrong, as even the government now admits. Under federal law, the TPA provides CASC coverage as an inseparable part of the employer's existing plan, and it is the employer (not the government) who must bestow this responsibility on the TPA.

As objecting ministries have consistently and correctly maintained, the accommodation does two things: it *hijacks* their health plans, turning them into conduits for the delivery of morally objectionable services, and it forces ministries to *trigger* the delivery of CASC services to plan participants. Indeed, given the legal framework in which the accommodation operates, this is the only way the accommodation can work.

The government's appellate victories below were built on the central myth, zealously advanced in the government's briefing, that the accommodation works independently of a ministry employer and its group health plan. The government's recent concessions before this Court expose the fallacy of

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(law foreclosing option of private school education violates fundamental right of parents); *Gonzales* v. *O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006) (federal statute that prohibits importation of drink used by religious group violates Religious Freedom Restoration Act).

that idea, and an accurate understanding of federal law confirms it.

I. The accommodation burdens employers' religious exercise by hijacking their health plans for the delivery of morally objectionable CASC services.

A. The government misinformed the lower courts that it can force a TPA to provide CASC services *outside of* a ministry's group health plan.

Although the accommodation was not squarely before this Court in *Hobby Lobby*, the government touched on the accommodation in its brief, claiming that "[i]f an organization invokes an accommodation, the women who participate in its plan will generally have access to contraceptive coverage through an *alternative mechanism established by the regulations*, under which the organization does not contract, arrange, pay, or refer for contraceptive coverage." Gov't Br. at 7, *Burwell* v. *Hobby Lobby Stores, Inc.*, Nos. 13-354, 13-356, 134 S. Ct. 2751 (2014) (emphasis added).[7]

In briefing before the Courts of Appeals, the government developed its narrative about how this "alternative mechanism" works. It told three of the four circuits represented in these consolidated cases that under the accommodation, religious ministries "need not place contraceptive coverage into the basket of goods and services that constitute their healthcare plans." Gov't *Priests for Life* Br. at 25, *supra* note 3; Gov't *Little Sisters* Br. at 23, *supra* note

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[7] Available at http://www.becketfund.org/wp-content/uploads/2014/01/13-354tsUnitedStates1.pdf.

5; Gov't Br. at 21, *Geneva College* v. *Sec'y U.S. Dep't of Health & Human Servs.*, Nos. 13-3536, 14-1374, 14-1376, 14-1377, 778 F.3d 422 (3d Cir. 2015) (quotation omitted).[8]

By the time the government filed its brief in the Fifth Circuit, it had reworked its arguments, relying heavily on the first CASC Mandate opinions from the Seventh and Sixth Circuits, which had blithely accepted the government's claim that the accommodation was an "opt out" that left ministries "effectively exempt" because the government creates an "independent obligation" to provide CASC services. Gov't *ETBU* Br. at 33-34, 22, *supra* note 4.

B. The Courts of Appeals uncritically accepted the government's argument, erroneously concluding that the accommodation does not hijack ministries' health plans.

The government's arguments below suggested that, after a self-insured employer submits the form or notice, the TPA is required to deliver CASC services outside of the employer's group health plan.

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[8] The government's *Geneva College* brief is available at http://www.becketfund.org/wp-content/uploads/2016/01/Geneva-College-3rd-Cir.-Governments-Brief.pdf. The government made the same representation to the Sixth and Seventh Circuits, whose decisions are not among these consolidated cases. See Gov't Br. at 26-27, *Mich. Catholic Conference* v. *Burwell*, Nos. 13-2723, 13-6640, 807 F.3d 738 (6th Cir. 2015), available at http://www.becketfund.org/wp-content/uploads/2016/01/Michigan-Catholic-Conference-6th-Cir.-Governments-Brief.pdf; Gov't Br. at 21, *Grace Schs.* v. *Burwell*, Nos. 14-1430, 14-1431, 801 F.3d 788 (7th Cir. 2015), available at http://www.becketfund.org/wp-content/uploads/2016/01/Grace-Schools-7th-Cir.-Governments-Brief.pdf.

The Courts of Appeals took the government's word for this, finding that the accommodation imposed no burden on ministries' religious exercise.

The errors began, and persisted, in the Seventh Circuit with its first three decisions on the accommodation, all authored by Judge Posner.[9] Judge Posner's *Notre Dame* decisions were the first appellate opinions and became the template for others. Every subsequent appellate decision that sided with the government looked to *Notre Dame* for guidance. It was in these decisions that Judge Posner accepted the government's characterization of the accommodation and dubbed it an "opt out." *Notre Dame I*, 743 F.3d at 550; *Notre Dame II*, 786 F.3d at 609. That phrase went judicially viral and was invoked over 200 times by five other circuits.[10]

Judge Posner called the accommodation an "opt out" because he thought the government could compel a TPA to provide CASC coverage independently of the objecting employer's group health plan. In Judge Posner's view, the accommodation did not make Notre Dame a "conduit" of CASC coverage because "under the [Affordable Care] Act the government uses

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[9] *Univ. of Notre Dame* v. *Sebelius*, 743 F.3d 547 (7th Cir. 2014) ("*Notre Dame I*"), *vacated and remanded*, 135 S. Ct. 1528 (2015); *Univ. of Notre Dame* v. *Burwell*, 786 F.3d 606 (7th Cir. 2015) ("*Notre Dame II*"); *Wheaton College*, 791 F.3d 792.

[10] *Little Sisters of the Poor* v. *Burwell*, 794 F.3d 1151 (10th Cir. 2015) (123 times); *Priests For Life* v. *U.S. Dep't of Health & Human Servs.*, 772 F.3d 229 (D.C. Cir. 2014) (44 times); *Geneva College* v. *Sec'y, U.S. Dep't of Health & Human Servs.*, 778 F.3d 422 (3d Cir. 2015) (5 times); *Catholic Health Care Sys.* v. *Burwell*, 796 F.3d 207 (2d Cir. 2015) (25 times); *Mich. Catholic Conference* v. *Burwell*, 807 F.3d 738 (6th Cir. 2015) (8 times).

private health plan administrators as *its* agents to provide medical services." *Notre Dame II*, 786 F.3d at 615 (emphasis added). It is "the federal government" that "determines (enlists, drafts, conscripts) substitute providers." *Id.* at 614. "*This coverage is separate from Notre Dame*," Judge Posner said, and "the university has stepped aside." *Id.* at 612.

Judge Posner went further in his *Wheaton College* decision, writing: "What had been Wheaton's plan, so far as emergency contraception was concerned, the Affordable Care Act made the government's plan when Wheaton refused to comply with the Act's provision on contraception coverage." 791 F.3d at 800. Under the accommodation, Judge Posner ventured, "new contracts are created," through "governmental plan instrument[s]," "to which [objecting employers are] not a party." *Id.* at 796, 800. Judge Posner insisted that "the government isn't using the college's plans" because CASC coverage was being provided through the "government's plan." *Id.* at 800–01. These pronouncements came with no citation to legal authority because there is none. In fact, there is no such thing as a "governmental plan instrument." The phrase does not appear in any federal statute or regulation, and has never before appeared in a published opinion.

The four circuits represented in this consolidated appeal followed the Seventh Circuit's lead, accepting the notion that the government can enforce the CASC Mandate outside of an objecting ministry's group health plans. The D.C. Circuit said that "contraceptive services are not provided to women because of Plaintiffs' contracts with insurance

companies." *Priests for Life*, 772 F.3d at 253. The Third Circuit held that the provision of contraceptive coverage under the accommodation "is not dependent upon Geneva [College]'s contract with its insurance company." *Geneva College*, 778 F.3d at 438 n.13. The Fifth Circuit insisted that the government "is requiring third-party administrators to offer [CASC coverage] *separately from the plans*." *E. Tex. Baptist Univ.* v. *Burwell*, 793 F.3d 449, 461 (5th Cir. 2015) (emphasis added). Finally, the Tenth Circuit found that the Little Sisters of the Poor's "only involvement in the [accommodation] scheme is the act of opting out"; that the accommodation "shift[s] responsibility to non-objecting entities"; and that "[o]pting out ensures they will play no part in the provision of contraceptive coverage." *Little Sisters of the Poor*, 794 F.3d at 1183, 1192.

Other circuits likewise accepted the government's account. "[T]he eligible organization's health plan does not host the coverage," the Sixth Circuit concluded. *Mich. Catholic Conf.*, 807 F.3d at 751. In the only Seventh Circuit opinion on the accommodation not authored by Judge Posner, the panel agreed that "the government does not use the health plans or contracts at all, much less alter any terms." *Grace Schs.* v. *Burwell*, 801 F.3d 788, 806 (7th Cir. 2015). "[N]othing in the ACA or regulations makes the plaintiffs complicit or allows their contracts with insurers or third party administrators to act as conduits for the provision of contraceptive services." *Id.* at 802.

C. Contrary to the government's account, the accommodation can work only by commandeering ministries' existing health plans.

The federal law that undergirds the accommodation is not as the government represented it below, and is not as the Courts of Appeals perceived it. No federal agency has authority—under the ACA, ERISA, or otherwise—to force the TPA of an objecting ministry to deliver CASC services outside of the ministry's existing plan. The accommodation does not create separate plans. If there were such a law, the government could by fiat order TPAs to deliver CASC services not only to employees of accommodated employers but also to those of exempt ones. If the accommodation works at all, it is only because it co-opts ministries' existing health plans and turns them into conduits for delivering CASC services.

The government and the courts below erred by ignoring the plan-centric character of the ACA and ERISA. At the most basic level, the ACA imposes the CASC Mandate on "group health plans." 42 U.S.C. § 300gg-13(a).[11] The HHS, DOL, and Treasury regulations do so as well. See 45 C.F.R. § 147.130(a)(1)(iv); 29 C.F.R. § 2590.715-2713(b)(1); 26 C.F.R. § 54.9815-2713T(a)(1)(iv).

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[11] The statute refers to "preventive care and screening [for women] provided for in the comprehensive guidelines supported by the Health Resources and Services Administration." 42 U.S.C. § 300gg-13(a)(4). HRSA later defined such preventive care to include CASC services. Although the ACA also imposes the CASC Mandate on "health insurance issuer[s]," *id.* § 300gg-13(a), that aspect of the Mandate is not addressed in this brief, see *supra* note 6.

Only employers can establish and maintain group health plans. The Public Health Service Act defines a "'group health plan' as an *employee* welfare benefit plan [as defined in ERISA § 3(1), codified at 29 U.S.C. § 1002(1)] to the extent that the plan provides medical care to *employees* or their dependents." 42 U.S.C. § 300gg-91(a)(1) (emphases added). ERISA likewise governs "*employee* welfare benefit plans," which it defines as "any plan, fund or program established or maintained *by an employer* for the purpose of providing for its participants or their beneficiaries medical care or benefits." 29 U.S.C. § 1002(1) (emphases added). Finally, the Internal Revenue Code defines a group health plan as "a plan (including a self-insured plan) of, or contributed to by, an *employer* to provide health care (directly or otherwise) to the *employees*, former *employees*, or others associated or formerly *associated with the employer*." 26 U.S.C. § 5000(b)(1) (emphases added).

Because only employers have group health plans, the penalty for failing to comply with the CASC Mandate—$36,500 per covered employee per year—is imposed on the employer that maintains a CASC-free "group health plan." 26 U.S.C. § 4980D(a), (b)(1), (e)(1). It is not imposed on TPAs defying the government's fiat. Because delivery of CASC services can be accomplished only through an employer's plan, the accommodation regulation requires self-insured employers to "contract[] with one or more third party administrators" that will serve as the employer's surrogate in providing the services the employer considers morally objectionable. See 26 C.F.R. § 54.9815-2713A(b)(1)(i). Absent an employer in continuing

contractual relationship with a TPA, no accommodation is possible because there is no one to receive the Form 700 or the notice from DOL and no one to provide CASC coverage.[12]

CASC coverage begins and ends with an employee's employment relationship. The employer has no obligation to provide CASC coverage to employees or their dependents who do not enroll or sign up in the plan. The employer's only obligation runs to those on its plan. Meanwhile, the TPA has duties only to those on the plan it administers. This obligation is entirely derivative of the plan and employment relationships. Thus, in order for the accommodation to accomplish its basic purpose, the employer must amend its own plan and thereby command its own TPA to provide its own employees with CASC services under its own plan. Under the accommodation, it is the employer's plan, and not a government plan, that provides CASC coverage.

Congress through the ACA, and the executive branch through regulations issued by HHS, DOL, and Treasury, impose the CASC Mandate on

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[12] One of the oddest provisions in the ACA regulations suggests the government's solicitude for the conscience of TPAs. The regulations permit a TPA to walk away from its contractual obligation to an employer upon learning that it must provide CASC services. See 26 C.F.R. § 54.9815-2713A (TPA has option "to remain in a contractual relationship with an eligible organization" after receiving the accommodation notice). This means that if a TPA abandons its contract, the employer must, to avoid huge fines, recruit a replacement TPA that is willing to arrange CASC services. The new TPA does this under the employer's plan that is co-opted under the accommodation. The requirement that the employer recruit a TPA with different religious values than the employer is itself another burden on the employer's religious exercise.

employers with respect to their group health plans. Nothing in the statutes or regulations grants individuals the right to obtain ACA-mandated CASC services other than through their employers' plans, and none of these laws gives the government authority to require CASC coverage other than through an employer's plan.

In sum, under the ACA and ERISA, the CASC Mandate simply does not apply outside of a plan established by, contributed to by, and associated with an employer. And the fines that the government uses to enforce the CASC Mandate can be levied only against the employer that sponsors the plan. 26 U.S.C. § 4980D(e)(1). Unless Congress amends the relevant statutes, HHS, DOL, and Treasury do not have authority to obligate a ministry's TPA to deliver CASC services outside of a ministry's existing plan.

D. The government has now abandoned its argument, admitting that the accommodation piggybacks on an objecting ministry's plan infrastructure.

Recent statements from the government confirm this reading of the law. In October, after briefing twenty-six cases at the Courts of Appeals and filing two of its four briefs opposing certiorari, the government made a critical concession to this Court: "**If the objecting employer has a self-insured plan, the contraceptive coverage provided by its TPA is, as an ERISA matter, part of the same ERISA plan as the coverage provided by the employer.**" Gov't *ETBU* Br. in Opp. at 19 (emphasis added).

Similarly candid statements by the government are found in the Federal Register. Whereas the government's litigating position convinced the Courts of

Appeals that a TPA's obligations under the accommodation arise out of "new contracts" "to which [objecting employers are] not a party," *Wheaton College*, 791 F.3d at 796, the government explained in the Federal Register that the accommodation does not require "plan participants and beneficiaries (and their health care providers) to have two separate health insurance policies (that is, the group health insurance policy and the individual contraceptive coverage policy)," 78 Fed. Reg. 39,870, 39,876 (July 2, 2013). To the contrary, the government designed the accommodation to work from inside the objecting employer's "insurance coverage network," taking advantage of the employer's existing "coverage administration infrastructure" to make the coverage flow. 80 Fed. Reg. 41,318, 41,328 (July 14, 2015).

II. The accommodation burdens employers' religious exercise by requiring the employer to submit a form or notice that triggers the delivery of morally objectionable CASC services by the employer's TPA.

A. The government wrongly told lower courts that it can *unilaterally* require a TPA to provide CASC services to participants in a ministry's group health plan.

In addition to arguing that it did not need ministry employers' *plans* to make the accommodation work, the government insisted it did not need the *employers* at all. The government maintained that it could unilaterally require TPAs to deliver CASC services, without involving employers in the process. This idea actually originated in the government's representations to this Court: "The Government contends," this Court noted in its

Wheaton College order, "that the applicant's health insurance issuer and third-party administrator are required by federal law to provide full contraceptive coverage regardless whether the applicant completes EBSA Form 700." *Wheaton College* v. *Burwell*, 134 S. Ct. 2806, 2807 (2014).

The government made similar statements to the Courts of Appeals, flatly denying the ministries' argument that the accommodation works only by involving them and forcing them to trigger CASC coverage. Again and again, the government characterized the accommodation as an "opt out" and an "exemption process." E.g., Gov't *ETBU* Br. at 32-33, *supra* note 4 (quotation omitted). To opt out, the government argued below, a ministry "need only step aside from contraception coverage, as it has always done." Gov't Br. at 23, *Notre Dame* v. *Sebelius*, No. 13-3853, 743 F.3d 547 (7th Cir. 2014) (quotation omitted).[13]

To maintain that argument, the government had to grapple with ERISA section 3(16), which says that a TPA has obligations as a plan administrator only if it is "specifically so designated by the terms of the instrument under which the plan is operated." 29 U.S.C. § 1002(16)(A). The government assured the Courts of Appeals that the Secretary of Labor's "broad rulemaking authority" under ERISA includes the power to unilaterally designate a ministry's TPA

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[13] The government's brief in *Notre Dame I* is available at http://www.becketfund.org/wp-content/uploads/2016/01/Notre-Dame-7th-Cir.-Governments-Brief.pdf. See also Gov't *Mich. Catholic Conf.* Br. at 11, *supra* note 8; Gov't *Priests for Life* Br. at 21, *supra* note 3; Gov't *Little Sisters of the Poor* Br. at 16, *supra* note 5; Gov't *Geneva College* at 16, *supra* note 8.

as a "plan administrator" under section 3(16) and thereby make the TPA a fiduciary with the legal duty to provide CASC services. Gov't Br. at 53 n.20, *Wheaton College* v. *Burwell*, 791 F.3d 792 (7th Cir. 2015);[14] see also 80 Fed. Reg. at 41,323 (claiming that DOL's "broad rulemaking authority under Title I of ERISA includes the ability to interpret and apply the definition of a plan administrator under ERISA section 3(16)(A)").

B. The Courts of Appeals uncritically accepted the government's argument, erroneously concluding that the accommodation does not force ministries to trigger the delivery of CASC services to plan participants.

The Courts of Appeal sided with the government on this argument, too. Accepting the notion that the government could unilaterally force TPAs to deliver CASC services to plan participants, the courts thought the ministries were mistaken in believing that the accommodation forced them to act as triggers of CASC coverage.

The courts' rejection of the ministries' "trigger" arguments took two forms. First, the Courts of Appeals erroneously accepted the government's claim that a TPA's legal obligation to deliver CASC services to a ministry's plan beneficiaries exists *before* the ministry invokes the accommodation. In the words of the D.C. Circuit, "Plaintiffs' 'permission slip' argument misstates how the regulations operate. As the Sixth and Seventh Circuits have also

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[14] Available at http://www.becketfund.org/wp-content/uploads/2015/05/2015-05-11-Wheaton-DOJ-Appellees-Brief.pdf.

concluded, the insurers' or TPAs' obligation to provide contraceptive coverage originates from the ACA and its attendant regulations, not from Plaintiffs' self-certification or alternative notice." *Priests for Life*, 772 F.3d at 252. As such, the TPA's "obligation" to deliver CASC services "exists apart from any action that Plaintiffs take." *Id.* The Fifth Circuit advanced this theory even more clearly: "the plaintiffs' completion of Form 700 or submission of a notice to HHS does not authorize or trigger payments for contraceptives, because the plaintiffs cannot authorize or trigger what others are already required by law to do." *ETBU*, 793 F.3d at 459 & n.38; see also *Notre Dame II*, 786 F.3d at 612–15 (concluding that federal law, not the completion of Form 700 or submission of a notice to HHS, triggers payments for contraceptives); *Geneva College*, 778 F.3d at 435–42 (same).

Second, the Courts of Appeals mistakenly concluded that even if a TPA's duty to deliver CASC services arose only after a ministry invokes the accommodation, it was the government, not the employer, that created this contractual obligation. The Seventh Circuit said that the government had the unilateral power to "[t]rea[t] and designat[e]" Notre Dame's TPA "as the plan administrator under section 3(16) of ERISA for any contraceptive services to be required." 743 F.3d at 555. The D.C. Circuit specifically endorsed the idea that the government has the legal authority to create plan instruments. The accommodation "does not, contrary to Plaintiffs' contention, amend or alter Plaintiffs' own plan instruments." *Priests for Life*, 772 F.3d at 255. Instead, the court held that the government has the "authority to author a plan instrument or designate a

particular writing as a plan instrument." *Id.* The Third Circuit likewise claimed that "the regulations specific to self-insured plan[s] in no way cause the appellees to facilitate or trigger the provision of contraceptive coverage. The eligible organization has no effect on the designation of the plan administrator; instead, it is *the government* that treats and designates the third-party administrator as the plan administrator under ERISA." *Geneva College*, 778 F.3d at 438 (citing *Notre Dame I*, 743 F.3d at 555).

C. Contrary to the government's representation, only employers (not the government) can execute plan instruments and bestow on TPAs the legal responsibility to deliver CASC services.

Justices Sotomayor, Ginsburg, and Kagan were correct: an objecting ministry's TPA "bears the legal obligation to provide contraceptive coverage only upon receipt of a valid self-certification." *Wheaton College*, 134 S. Ct. at 2814 n.6 (Sotomayor, J., dissenting). That is because, under ERISA, a TPA's obligation to deliver CASC services arises only upon its appointment as plan administrator. That appointment, in turn, can occur only in a written instrument executed by the employer. See 29 U.S.C. § 1002(16)(A)(i). Contrary to what the government argued and the lower courts accepted, the government cannot unilaterally force TPAs to become plan administrators. Only the employer can bestow this responsibility on a TPA. This is precisely why the government forces ministries to execute Form 700 or the HHS notice.

Under ERISA, the employer controls a plan's basic terms. It is the exclusive role of the employer, as plan sponsor, to create an employee benefit plan by establishing a written instrument that sets out a plan's "basic terms and conditions." *Cigna Corp.* v. *Amara* 131 S. Ct. 1866, 1877 (2011) (citing 29 U.S.C. §§ 402, 1102); see also *US Airways, Inc.* v. *McCutchen*, 133 S. Ct. 1537, 1548 (2013) ("[ERISA] is built around reliance on the face of written plan documents."). Under ERISA, the employer must explain in this document how it will amend its plan. *Cigna Corp.*, 131 S. Ct. at 1877 These amendment procedures "must be followed for the valid adoption of an amendment." *Overby* v. *Nat'l Ass'n of Letter Carriers*, 595 F.3d 1290, 1295 (D.C. Cir. 2010) (citing *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 85 (1995)). Statements in documents not issued by the plan sponsor "do not themselves constitute the terms of the plan." *Cigna Corp.*, 131 S. Ct. at 1878 (emphasis omitted).

ERISA is equally clear that only the employer has authority to designate a plan administrator. 29 U.S.C. § 1002(16). The plan administrator is the person "so designated" in the plan instrument described above. *Id.* § (16)(A)(i).[15] Congress has specified that the Secretary of Labor may overrule this designation only if the plan sponsor "cannot be identified." *Id.* § (16)(A)(iii).[16]

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[15] If the plan instrument is silent on this matter, the plan sponsor (employer) holds this responsibility by default. 29 U.S.C. § 1002(16)(A)(ii).

[16] If a plan sponsor cannot be identified, the plan is called an "orphan plan." See DOL, *Report of the Working Group on Orphan Plans* (Nov. 8, 2002), http://www.dol.gov/ebsa/

For government regulators beholden to their Mandate but faced with the chorus of religious objections from self-insured ministries, ERISA's statutory limitations created a dilemma. The ministries' plans did not cover CASC services, and the TPAs for those plans were not legally obligated to provide those services. To make this accommodation work, regulators needed to make TPAs legally responsible for delivering CASC services to plan participants. But, as earlier noted, TPAs cannot be forced to do this outside of the ministries' existing plans. Because ERISA forced regulators to work through the ministries' own plans, they had to find some way to make the *ministries themselves* both amend their plans to cover CASC services and designate their TPAs as "plan administrators" with respect to those services.

So the government devised Form 700. This form is a plan-amending instrument masquerading as an opt-out. DOL's regulation acknowledges that the self-certification form "is one of the instruments under which *the plan* is operated under ERISA section 3(16)(A)(i)." 29 C.F.R. § 2510.3-16 (emphasis added). The last line on the back of the form says the same thing: "This form is an instrument under which *the plan* is operated." See *infra*, Appendices at 3a (emphasis added).

"*[T]he plan*" here, of course, is the ministry's plan. By executing Form 700, the ministry is amending its own plan and commanding its own TPA to provide its own employees with CASC

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publications/AC_110802_report.html. The government has never sought to justify any aspect of the accommodation based on the orphan-plan provision.

services under the plan. This is how the accommodation actually operates. And given ERISA's constraints, it is the only way the government could make it work.[17]

Contrary to the government's litigating position, nothing about the accommodation works independently of the ministry employer and its self-insured plan. What the accommodation does is alarmingly simple: it forces the ministry to amend its own plan to cover CASC services and requires the ministry to appoint a third party (the TPA) to deliver those services through the plan. It is simple because, when the underlying law is understood, the accommodation—and particularly the government's insistence that ministries execute Form 700 or the HHS notice—makes sense. It is alarming, though, because the government has never been forthright about it. The government never adequately

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[17] The augmented accommodation is no different. It operates under the same law and is subject to the same constraints. Like the original accommodation, the augmented accommodation makes the TPA a plan administrator under ERISA section 3(16)(A). 80 Fed. Reg. at 41,323. The government equivocates on whether it is the employer's notice to HHS or DOL's subsequent notice to the TPA that serves as the plan instrument that ERISA section 3(16)(A)(i) requires. Compare EBSA Form 700 (rev. Aug. 2014), *infra*, Appendices at 7a ("*[A] notice to the Secretary* is an instrument under which the plan is operated." (emphasis added)), with 80 Fed. Reg. at 41,323 ("*The DOL notification* will be an instrument under which the plan is operated. " (emphasis added)). But even as DOL claims its "broad rulemaking authority" includes the ability to interpret ERISA section 3(16) contrary to its express terms, it never asserts power to compel a TPA to act outside the employer's plan. In the end, it still acknowledges that the notice is "an instrument under which *the plan* is operated." *Id.* (emphasis added).

explained to the Courts of Appeals how the accommodation really works. Worse, the government actually picked up on the lower courts' misconceptions, citing and quoting them in subsequent briefs before other Circuits. Undoubtedly, the government acted this way because it understands what ministries have long known: that the accommodation, like the CASC Mandate, makes ministries morally complicit in the provision of services that violate their consciences. See *Hobby Lobby Stores*, 134 S. Ct. at 2778-79.

D. The government now admits that it is the employer's act that triggers CASC coverage.

In its briefing to this Court, the government has walked back its early representation that it has the authority, without involving the employer, to turn a TPA into a plan administrator for CASC services. The government now admits that "[i]n the self-insured context, the accommodation regulations designate an objecting employer's TPA as the entity legally responsible for complying with the contraceptive-coverage requirement *only after* the organization itself opts out." Gov't *Priests for Life* Br. in Opp. at 21 n.11 (emphasis added). The government's briefing has finally acknowledged what black-letter ERISA law makes clear: the government cannot designate a plan administrator unilaterally. To make the accommodation work, the government needs the employer to affirmatively act—to execute Form 700 or the HHS notice.

Still, the government's litigating position has not fully caught up with legal reality. Even as it makes the above concession, the next sentence of the

government's brief continues to obfuscate: "But the obligation [i.e., the TPA's obligation] is still imposed by the government, not by the objecting employer." *Id.* While it is true that a TPA, once appointed as plan administrator, has obligations *imposed by law* to deliver CASC services to plan participants, government regulators cannot bestow this obligation on the TPA in the first instance. Under ERISA, only the employer can do that. The government's accommodation is objectionable because it *forces* the employer to do that. It forces the employer to designate the TPA as the party responsible for delivering CASC services through the plan. Again, that is the hidden purpose and actual legal effect of Form 700 and the HHS notice. What else accounts for the government's dogged insistence that ministries execute these instruments?

III. The First Amendment precludes the courts from second-guessing the ministries' moral judgment.

Imagine a law that requires a property owner, in time of war, to unlock his gate so soldiers can enter the property to launch artillery at the enemy. One landowner is a religious pacifist who, for religious reasons, objects to the law because it conscripts his property in service of the war effort. The landowner believes that unlocking his gate for soldiers makes him complicit in actions to which he conscientiously objects. See *Thomas*, 450 U.S. 707.

In response, the government offers an "accommodation" to the landowner: instead of unlocking the gate himself, the landowner may bestow this legal responsibility on his current

groundskeeper by handing over the key. We doubt this accommodation would satisfy the landowner's conscience. First, it does not relieve the original moral-complicity problem: the conscription of the landowner's own property as a killing field. Second, the government's accommodation still requires the landowner to act to cause the conscription to occur: either he must unlock the gate himself or he must turn over the key and make his groundskeeper the responsible party. Either way, the landowner is still complicit in what he considers immoral acts of war that deliberately harm human beings.

Properly understood, this is essentially how the CASC Mandate and the regulatory accommodation work with respect to religious ministries. And properly grasped, these ministries' objections to the accommodation "implicat[e] a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another." *Hobby Lobby*, 134 S. Ct. at 2778. It is not for the government, the Courts of Appeals, or this Court to second-guess these ministries' conscientious answer to that question. Like the landowner in the metaphor, the ministries here "drew a line, and it is not for [the government or the courts] to say that the line [they] drew was an unreasonable one." *Thomas*, 450 U.S. at 715.

CONCLUSION

For these reasons, the Catholic Benefits Association and the Catholic Insurance Company pray that this Court reverse the judgment of the

Court of Appeals and hold that the accommodation substantially burdens religious exercise.

Respectfully submitted,

L. MARTIN NUSSBAUM
Counsel of Record
ERIC N. KNIFFIN
IAN S. SPEIR
Lewis Roca Rothgerber Christie LLP
90 S. Cascade Ave.
Suite 1100
Colorado Springs, CO 80903

Counsel for *Amici Curiae*
January 11, 2016

sdg

APPENDICES

EBSA FORM 700—CERTIFICATION

(To be used for plan years beginning on or after January 1, 2014)

This form is to be used to certify that the health coverage established or maintained or arranged by the organization listed below qualifies for an accommodation with respect to the federal requirement to cover certain contraceptive services without cost sharing, pursuant to 26 CFR 54.9815-2713A, 29 CFR 2590.715-2713A, and 45 CFR 147.131.

Please fill out this form completely. This form must be completed by each eligible organization by the first day of the first plan year beginning on or after January 1, 2014, with respect to which the accommodation is to apply, and be made available for examination upon request. This form must be maintained on file for at least 6 years following the end of the last applicable plan year.

Name of the objecting organization	
Name and title of the individual who is authorized to make, and makes, this certification on behalf of the organization	
Mailing and email addresses and phone number for the individual listed above	

I certify that on account of religious objections, the organization opposes providing coverage for some or all of any contraceptive services that would otherwise be required to be covered; the organization is organized and operates as a nonprofit entity; and the organization holds itself out as a religious organization.

Note: An organization that offers coverage through the same group health plan as a religious employer (as defined in 45 CFR 147.131(a)) and/or an eligible organization (as defined in 26 CFR 54.9815-2713A(a); 29 CFR 2590.715-2713A(a); 45 CFR 147.131(b)), and that is part of the same controlled group of corporations as, or under common control with, such employer and/or organization (each within the meaning of section 52(a) or (b) of the Internal Revenue Code), may certify that it holds itself out as a religious organization.

I declare that I have made this certification, and that, to the best of my knowledge and belief, it is true and correct. I also declare that this certification is complete.

_____

Signature of the individual listed above

_____

Date

The organization or its plan using this form must provide a copy of this certification to the plan's health insurance issuer(s) (for insured health plans) or a third party administrator(s) (for self-insured health plans) in order for the plan to be accommodated with respect to the contraceptive coverage requirement.

Notice to Third Party Administrators of Self-Insured Health Plans

In the case of a group health plan that provides benefits on a self-insured basis, the provision of this certification to a plan's third party administrator that will process claims for contraceptive coverage required under 26 CFR 54.9815-2713(a)(1)(iv) or 29 CFR 2590.715-2713(a)(1)(iv) constitutes notice to the third party administrator that:

(1) The eligible organization will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and

(2) The obligations of the third party administrator are set forth in 26 CFR 54.9815-2713A, 29 CFR 2510.3-16, and 29 CFR 2590.715-2713A.

This form is an instrument under which the plan is operated.

PRA Disclosure Statement

According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 0938-XXXX. The time required to complete this information collection is estimated to average 50 minutes per response, including the time to review instructions, search existing data resources, gather the data needed, and complete and review the information collection. If you have comments concerning the accuracy of the time estimate(s) or suggestions for improving this form, please write to: CMS, 7500 Security Boulevard, Attn: PRA Reports Clearance Officer, Mail Stop C4-26-05, Baltimore, Maryland 21244-1850.

EBSA FORM 700—CERTIFICATION
(revised August 2014)

This form may be used to certify that the health coverage established or maintained or arranged by the organization listed below qualifies for an accommodation with respect to the federal requirement to cover certain contraceptive services without cost sharing, pursuant to 26 CFR 54.9815-2713A, 29 CFR 2590.715-2713A, and 45 CFR 147.131. Alternatively, an eligible organization may also provide notice to the Secretary of Health and Human Services.

Please fill out this form completely. This form should be made available for examination upon request and maintained on file for at least 6 years following the end of the last applicable plan year.

Name of the objecting organization	
Name and title of the individual who is authorized to make, and makes, this certification on behalf of the organization	
Mailing and email addresses and phone number for the individual listed above	

I certify the organization is an eligible organization (as described in 26 CFR 54.9815-2713A(a), 29 CFR 2590.715-2713A(a); 45 CFR 147.131(a)) and/or an eligible organization (as defined in 26 CFR 54.9815-2713A(a); 29 CFR

2590.715-2713A(a); 45 CFR 147.131(b)), and that is part of the same controlled group of corporations as, or under common control with, such employer and/or organization (within the meaning of section 52(a) or (b) of the Internal Revenue Code), is considered to meet the requirements of 26 CFR 54.9815-2713A(a)(3), 29 CFR 2590.715-2713A(a)(3), and 45 CFR 147.131(b)(3).

I declare that I have made this certification, and that, to the best of my knowledge and belief, it is true and correct. I also declare that this certification is complete.

_____

Signature of the individual listed above

_____

Date

The organization or its plan using this form must provide a copy of this certification to the plan's health insurance issuer (for insured health plans) or a third party administrator (for self-insured health plans) in order for the plan to be accommodated with respect to the contraceptive coverage requirement.

Notice to Third Party Administrators of Self-Insured Health Plans

In the case of a group health plan that provides benefits on a self-insured basis, the provision of

this certification to a third party administrator for the plan that will process claims for contraceptive coverage required under 26 CFR 54.9815-2713(a)(1)(iv) or 29 CFR 2590.715-2713(a)(1)(iv) constitutes notice to the third party administrator that the eligible organization:

(1) Will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and

(2) The obligations of the third party administrator are set forth in 26 CFR 54.9815-2713A, 29 CFR 2510.3-16, and 29 CFR 2590.715-2713A.

As an alternative to using this form, an eligible organization may provide notice to the Secretary of Health and Human Services that the eligible organization has a religious objection to providing coverage for all or a subset of contraceptive services, pursuant to 26 CFR 54.9815-2713A(b)(1)(ii)(B) and (c)(1)(ii), 29 CFR 2590.715-2713A(b)(1)(ii)(B) and (c)(1)(ii), and 45 CFR 147.131(c)(1)(ii). A model notice is available at: http://www.cms.gov/cciio/resources/Regulationsand-Guidance/index.html#Prevention.

This form or a notice to the Secretary is an instrument under which the plan is operated.

PRA Disclosure Statement

According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 1210-0150. An organization that seeks to be recognized as an eligible organization that qualifies for an accommodation with respect to the federal requirement to cover certain contraceptive services without cost sharing may complete this self-certification form, or provide notice to the Secretary of Health and Human Services, in order to obtain or retain the benefit of the exemption from covering certain contraceptive services. The self-certification form or notice to the Secretary of Health and Human Services must be maintained in a manner consistent with the record retention requirements under section 107 of the Employee Retirement Income Security Act of 1974, which generally requires records to be retained for six years. The time required to complete this information collection is estimated to average 50 minutes per response, including the time to review instructions, gather the necessary data, and complete and review the information collection. If you have comments concerning the accuracy of the time estimate(s) or suggestions for improving this form, please write to: U.S. Department of Labor, Employee Benefits Security Administration, Office of Policy and Research, 200 Constitution Avenue, N.W., Room N-5718, Washington, DC 20210 or email ebsa.opr@dol.gov and reference the OMB Control Number 1210-0150.